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No. 73-447

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In the Supreme Court of the United States

OCTOBER TERM, 1973

WALLACE CUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 12a-18a) is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on June 20, 1973. The petition for a writ of certiorari was filed on September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner's claim for monetary reimbursement for lost wages due to a denial of a security clearance in 1957, filed in April 1972, almost six years after the grant of authorization for access to classified material in June 1966, is barred by a Defense Department Directive, issued in December 1966, which provides a one-year limitation on the filing of such claims.

STATUTES INVOLVED

The pertinent regulations are set forth in petitioner's Appendix 19a-36a.

STATEMENT

In June, 1957, the Department of Defense notified petitioner, then employed by Emerson Radio and Phonograph Corporation, of the denial of his application for a "secret" security clearance, the reasons for the denial and his rights of appeal.

Following the termination of his employment, petitioner appealed the denial of his security clearance. After hearing, a Department of Defense Hearing Board reaffirmed the denial. Petitioner then requested reconsideration by the Department of Defense Review Office, contending that the procedures followed in his case failed to meet the standards required by *Greene* v. *McElroy,* 360 U.S. 474. During the pendency of petitioner's appeal, the President, on February 20, 1960, issued Executive Order No. 10865, which authorized the creation of a security clearance program embodying the procedural safeguards required by the *Greene* decision. Pursuant to the President's Executive Order, the Secretary of Defense promulgated Department of Defense Directive 5220.6, July 28, 1960, which cancelled and superseded former Department of Defense Directive 5220.6, February 2, 1955. Petitioner was thereafter notified that his case would be reprocessed pursuant to the procedures set forth in the new Department of Defense directive. Petitioner pursued the new procedures, and a security clearance was granted on June 22, 1966 (Pet. App. 13a).

Almost six years later, in April, 1972, petitioner submitted an administrative claim for monetary resti-

tution under a Department of Defense regulation providing for reimbursement of earnings lost by a contractor employee who had been inequitably denied a security clearance. The Department of Defense directive then in effect, No. 5220.6, issued on December 7, 1966 (subparagraph F, Pet. App. 25a), provided a one-year limitation on the filing of such claims. Accordingly, on May 5, 1972, the Department of Defense denied the claim as time barred, since petitioner's claim had accrued almost six years earlier (Pet. App. 13a-14a).

Petitioner then filed a petition in the Court of Claims, alleging that his claim for monetary restitution was not time barred as it was governed by the 1955 Department of Defense directive which was in effect when his security clearance was denied, and which contained no provision limiting the time in which a claim had to be submitted. The Court of Claims dismissed the suit as time barred. The court concluded that the 1966 directive was controlling since "we see no reason why the Department which gave the right cannot decide to circumscribe it with this reasonable and appropriate procedural requirement," and petitioner "had a reasonable time, after the 1966 regulation became operative, to present his claim—but he failed by the widest of margins" (Pet. App. 15a-16a, 18a).

ARGUMENT

The decision of the Court of Claims is correct, and fully consistent with *Greene* v. *United States,* 376 U.S. 149. Review by this Court is unwarranted.

In *Greene* v. *United States, supra,* this Court held that a claimant seeking monetary reimbursement under the same program as petitioner was entitled

to relief under the 1955 regulation as opposed to the 1960 regulation because his claim had been filed 6 months *before* the 1960 regulation went into effect, and furthermore, because there had been a significant change in the *substantive* requirements for restitution.[1] The Court went on to say:

> We do not suggest that a claimant, seeking damages under a former regulation, need not resort to administrative proceedings under a new regulation where the new regulation contains essentially the same substantive requirements as its predecessor.

Greene v. *United States,* 376 U.S. at 163. As the Court of Claims correctly noted, there is no basis in *Greene* to excuse petitioner from complying with the purely *procedural* condition of the 1966 regulation that a claim must be filed within one year of final disposition of a case. Moreover, petitioner did not assert his right to restitution until almost six years *after* the promulgation of the 1966 directive[2] (Pet. App. 15a, 17a).

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[1] The change in the 1960 directive created an additional burden on a claimant of showing at a later time that if he had been afforded fair procedures initially he would have been able to demonstrate that he was entitled to a security clearance. The 1955 directive, which was in effect when Greene's rights matured and were asserted, provided that governmental liability follows a final determination favorable to the claimant. The Court held that under these circumstances retroactive application of the 1960 directive would be unjustified. *Greene* v. *United States,* 376 U.S. at 159-163.

[2] Petitioner's allegation that he was dismissed from employment at Emerson was contested by the government. There are few if any records available to resolve this conflict. As the Court of Claims noted, petitioner's belated presentation was the cause of this dilemma, and, had he filed his claim within the time required in the 1966 directive, the means of settling

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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the controversy might have been available. Although not reaching the government's defense of laches, the Court of Claims indicated that the delay in filing the claim prejudiced the government, for it no longer had these records available (Pet. App. 16a, n. 9). Petitioner's delay in filing the claim, and the resulting prejudice to the government, under the doctrine of laches, is an independent ground for barring petitioner from obtaining the requested relief. *Whitney* v. *Fox,* 166 U.S. 637, 647; *Abraham* v. *Ordway,* 158 U.S. 416, 420.

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